Neutral citation [2024] CAT 45

Case No: 1431/5/7/22 (T)

IN THE COMPETITION APPEAL TRIBUNAL

5 July 2024

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Before:

SIR MARCUS SMITH
(President)
THE HONOURABLE LORD ERICHT
THE HONOURABLE MR JUSTICE HUDDLESTON

Sitting as a Tribunal in England and Wales

BETWEEN:

(1)-(138) ADUR DISTRICT COUNCIL AND OTHERS

Claimants

- v -

(1) TRATON SE (SUBSTITUTED FOR MAN SE)

(2) MAN TRUCK & BUS SE (FORMERLY MAN TRUCK & BUS AG)

(3) MAN TRUCK & BUS DEUTSCHLAND GMBH

(4) AB VOLVO (PUBL)

(5) VOLVO LASTVAGNAR AKTIEBOLAG

(6) VOLVO GROUP TRUCKS CENTRAL EUROPE GMBH

(7) RENAULT TRUCKS SAS

(8) DAIMLER AG

(9) STELLANTIS N.V. (FORMERLY FIAT CHRYSLER AUTOMOBILES N.V.)

(10) CNH INDUSTRIAL N.V.

(11) IVECO S.P.A

(12) IVECO MAGIRUS AG

(13) PACCAR INC

(14) DAF TRUCKS N.V.

(15) DAF TRUCKS DEUTSCHLAND GMBH

Defendants

- and -

(1) SCANIA AKTIEBOLAG (PUBL)

(2) SCANIA CV AKTIEBOLAG (PUBL)

(3) SCANIA DEUTSCHLAND GMBH

Third Parties

Heard at Salisbury Square House on 17 May 2024

JUDGMENT (STRIKE OUT / SUMMARY JUDGMENT)

APPEARANCES

Mr Thomas de la Mare KC and Ms Flora Robertson (instructed by Fieldfisher LLP) appeared on behalf of the Adur Claimants.

Ms Sarah Abram KC and Ms Rachel Oakeshott (instructed by Herbert Smith Freehills LLP, Slaughter and May, and Allen Overy Shearman Sterling LLP) appeared on behalf of the First to Third Defendants, the Ninth to Twelfth Defendants, and the First to Third Third Parties.

A. INTRODUCTION

1. By its decision of 19 July 2016 in Case AT.39824 – *Trucks* (the **Settlement Decision**), the European Commission (the **Commission**) determined that five truck manufacturers – DAF, MAN, Daimler, Iveco and Volvo/Renault (the **Defendants**) had carried out a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) and Article 53 of the Agreement on the European Economic Area (**EEA Agreement**) between 1997 and 2011 (the **Cartel**).

2. Scania, another truck manufacturer, was pursued by the Commission but did not adopt the settlement procedure. By a decision of 27 September 2017, the Commission found that Scania was part of the Cartel, and this has been upheld by the EU General Court on 2 February 2022 (Case T-799/17) and the Court of Justice of the EU on 1 February 2024 (C-251/22 P).

3. This case is being managed with the Trucks Second Wave Proceedings (the **Wave 2 Proceedings**). The relevant background is set out in the Tribunal's Ruling of the Future conduct of the Wave 2 Proceedings dated 9 January 2024: [2024] CAT 2 (the **Ruling**).

4. The Adur District Council and other claimants in the Adur Proceedings (the **Claimants**) are public authorities in the UK (local government authorities and/or fire & rescue services). They comprise the following public authorities:

	England	**Wales**	**Scotland**
Local authorities	104	12	2
Fire and rescue services	16	3	1
Total	**120**	**15**	**3**

5. The Claimants allege that they have suffered an overcharge, by virtue of the Cartel operated by the Defendants (the **Overcharge**). The Claimants bring the present claim to recover that Overcharge from the Defendants as damages for breach of statutory duty.

6. In the Ruling, the Tribunal explained that it intended to approach the Wave 2 Proceedings by way of an issues-based approach, including the issue of pass-on "*broadly conceived*" (at [14(2)]). Consistent with that approach, one of the identified issues for trial, as per issue 8 of the parties' Market Structure Diagram, is whether there is downstream pass-on from the public authority claimants:

> **"Provision of services by Public Authorities to Consumers/End users**
>
> **("Public Authority Pass-On")**
>
> This line represents the provision of goods and/or services by Public Authorities (including Local Authorities and Fire and Rescue Services) to consumers/end users. The issue is the extent to which any Overcharge suffered by the Public Authorities has been passed on to consumers/end users. There are no claims for Overcharge from end users of Public Authorities' services that relate to the pass-on of the Overcharge that was paid by the Public Authorities. The affected Claims are listed in Schedule 8."

7. The Claimants submitted an application dated 31 January 2024 for strike out of, or alternatively, summary judgment in their favour in relation to, certain mitigation of Overcharge arguments raised by the Defendants, namely:

   (1) Contentions that the Claimants passed on the Overcharge through the increase of prices or rates downstream (supply pass-on), namely increasing council tax, through increasing charges for waste (excluding commercial waste), and through increasing fire & rescue service charges.

   (2) Various other discrete mitigation defences by the Defendants (the **Application**).

8. The Application is supported by the following evidence:

   (1) Richard Pike, a partner at Fieldfisher LLP, dated 31 January 2024 (**Pike2**) and 8 March 2024;

   (2) Ian Williams of Liverpool City Council dated 31 January 2024, regarding local authority funding in England;

(3) Amanda Hughes of Conwy County Borough Council dated 31 January 2024, regarding local authority funding in Wales;

(4) Paul Allen of North-East Lincolnshire Council dated 31 January 2024, regarding unitary local authority funding in England;

(5) Brian Porter of The Highland Council dated 1 February 2024, regarding local authority funding in Scotland;

(6) Helen MacArthur of North Wales Fire and Rescue Service dated 26 January 2024, regarding the funding of fire and rescue authorities in England and Wales;

(7) Alan Duncan of the Scottish Fire and Rescue Service dated 31 January 2024, regarding funding in Scotland;

(8) Duncan Savage of the East Sussex Fire and Rescue Service dated 31 January 2024, regarding fire authority charges; and

(9) Phillip Sherratt of Durham County Council dated 31 January 2024, regarding local authority charges.

9. The Claimants also rely on an expert statement prepared by Niels Frank dated 1 December 2023 regarding, among other issues, the approach to assessing 'public authority pass-on' in the Wave 2 Proceedings.

10. The Defendants responded to the Application with reports from: (i) forensic accountant Mark Bezant, dated 28 March 2024; and (ii) economist Robin Noble, dated 28 March 2024.

B. DOWNSTREAM PASS-ON

11. The relevant pleas by which the Defendants have alleged downstream pass-on, are as follows:

MAN/Traton Amended Defence para 25:

"(a) The MAN Defendants aver that the Claimants passed on any [Overcharge] in whole, or alternatively in part, as follows:

i) to their customers; …"

Iveco Defence paras 6.14, 34.1

6.14: "Further and alternatively, even if (which is not admitted) the Infringement caused the Claimants and/or Original Purchasers to pay higher prices either during or after the Infringement Period (as defined in paragraph 9 below), it is denied that the Claimants will be able to recover damages to the extent that any part of those higher prices was passed on by the Claimants and/or Original Purchasers, or was mitigated and/or avoided by the Claimants and/or Original Purchasers, through:(a) increasing the prices charged to their customers;…"

Volvo/Renault Defence paras 6(i), 38(b), 39

6(i): "In the alternative, if the Claimants did incur higher costs (or otherwise did incur any other burden by reason of the Admitted Conduct), the assessment of the Claimants' recoverable loss and damage must take account of the extent to which they passed on those increased costs or other burdens to their counterparties or to other parties in the form of higher fees or charges for the provision of services or higher rates, and so suffered no (alternatively, less) loss."

DAF Defence para 41(c)

" … DAF contends that any [Overcharge] paid by the Claimants were wholly or partly mitigated by them, and without limitation that they were:

(i) Passed on by the Claimants through increases in their rates, charges and/or the price of any other services they provided for payment ("charges"). Without limitation, DAF avers that the Claimants will have set such charges so as to recover their input costs; …"

Daimler Defence para 36

"As to paragraph 35, it is averred that even if (which is not admitted) the Claimants are able to prove that they suffered any alleged Overcharge (and any alleged Run-Off Overcharge and/or Umbrella Overcharge), such overcharges would not constitute the measure of the Claimants' loss and damage, as they allege. In that regard:

a) Daimler's case Is that the Claimants passed on all or most of the cost of the trucks that they purchased and/or leased and the cost of any Truck Dependent Services (including any overcharges, the existence / extent of which are not admitted) and/or mitigated their alleged losses (which are not admitted) by … and/or (iii) increasing the prices of any other charged-for services provided by the Claimants; and/or (iv) increasing council taxes charged by certain Claimants; …"

12. The Application relates to all of the relevant downstream costs on which there might be said to be supply pass-on, with one exception. The single exception is charges for commercial waste. As to the exclusion of commercial waste charges,

the Claimants submit that if the Application is successful, this will be entirely dispositive of the "Public Authority Pass-On" issue for all Claimants which did not impose charges for commercial waste collection, including all fire & service authorities and various other Claimants as detailed in Pike2 – at least 51 Claimants.

C. OTHER PLEADED ALLEGATIONS OF MITIGATION OF LOSS

13. In addition, the Claimants request strike out and/or summary judgment of the following pleas that the Claimants have mitigated their loss. This aspect of the Application is focused on particular allegations within the parties' pleaded case.

(a) Iveco

14. First, at para 34.1, Iveco pleads:

> "It is denied that the Claimants will be able to recover damages to the extent that the alleged [Overcharge] was passed on by the Claimants and/or Original Purchasers or was mitigated and/or avoided by the Claimants and/or Original Purchasers through: … (d) by reducing their costs by negotiation with any of their other supplies or other third parties. Iveco reserves the right to amend this Defence and plead further in relation to pass on and mitigation following disclosure and the exchange of factual and expert evidence."

15. Second, at para 34.2, Iveco pleads:

> "In the event that any Claimant and/or Original Purchaser and/other entity that purchased and/or leased Trucks during or after the Relevant Period was acquired by a Claimant (however that acquisition was structured) subsequent to the commencement of the Relevant Period, the acquiring Claimant must give credit for any lower acquisition price that may have been paid as a result of the Admitted Conduct (if any)."

16. Third, at para 34.3, Iveco pleads:

> "Any damages payable to the Claimants must be assessed on a post-tax basis and/or the Claimants must give credit for any benefits received as a result of any decrease in corporation tax rates since the relevant loss and damage was suffered."

17. Fourth, at para 34.4, Iveco pleads:

> "The Claimants must give credit for any benefits received as a result of the Claimants holding more expensive truck assets to depreciate and write off as against profits, when the real value of those assets was lower."

(b) Volvo/Renault

18. At paras 6(i) and 38(b) of the Volvo/Renault Defence, it is pleaded that:

> "… To the extent that the purchase or lease of Trucks, or the purchase of Truck Dependent Services, was funded by grants or revenue provided for those purposes by the central government or other government bodies, the Claimants have suffered no loss. …"

(c) DAF

19. At para 42 of its Defence, DAF pleads:

> "Further or alternatively, if the Claimants did suffer loss, any tax liabilities they had would have been lower than if they had not suffered such loss. In order to avoid any such overcompensation, and insofar as they have not already done so, the Claimants must accordingly give credit for any tax advantage received as a result of the loss suffered."

(d) Daimler

20. At para 36(a) of its Defence, Daimler pleads:

> "Daimler's case is that the Claimants passed on all or most of the cost of the trucks that they purchased and/or leased and the cost of any Truck Dependent Services (including any overcharges, the existence/extent of which are not admitted) and/or mitigated their alleged losses (which are not admitted) by … and/or (v) engaging in cost cutting measures so as to extinguish or reduce any alleged losses claimed by the Claimants. Daimler infers that the said cost cutting measures arose in whole or in part due to, or as a result of, the fact that a substantial proportion of the Claimants' overall costs of the activities for which they purchased/leased Trucks and/or purchased Truck Dependent Services comprised the costs of those Trucks / Truck Dependent Services. Daimler will provide further particulars in due course following disclosure and/or further information and/or the preparation of expert evidence as to the nature of the Claimants' cost cutting measures, the manner in which they were achieved and the extent to which they had any impact on the business of the Claimants. Presently, the best particulars that Daimler can give are that these cost cutting measures included (but were not necessarily limited to) measures relating to the cost of suppliers, employees and similar inputs…"

D. LEGAL FRAMEWORK

21. The correct approach to an application to strike out a claim, or summary judgment on a claim, is set out at [15] of the judgment of Lewison J in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch). The test was applied by the Court of Appeal (Floyd LJ) in *TFL Management Services Ltd v Lloyds Bank* [2013] EWCA Civ 1415 (***TFL***) at [26]:

> " .. the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
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> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
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> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
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> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show

> by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

22. As pointed out by Lewison J at [15(v)] and [15(vi)] regard should be had not only to the evidence before the Tribunal today but evidence which can reasonably be expected to be available at trial and a court should hesitate to strike out a claim where "*reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available*".

23. In *TFL* Floyd LJ stated, at [27], that a court should consider very carefully "*before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action*".

24. As noted by the Supreme Court in *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 (***Okpabi***) at [21][1], courts should avoid "mini-trials". Cases which raise complex factual issues are unlikely to be capable of being resolved without a mini-trial on the documents (without disclosure and without oral evidence).

25. The test for summary determination of an argument on causation was set out by the Court of Appeal (Green LJ) in *NTN v Stellantis* [2022] EWCA Civ 16 (***NTN***), a case concerned with mitigation through pass-on, as follows:

> "33. …The burden of proof when pleading causation is on the defendant to demonstrate: (a) that there is a legal and proximate, causal, connection between the overcharge and the act of mitigation; and (b), that this connection is "*realistic*" or "*plausible*" (the two phrases being interchangeable) and carries some "*degree of conviction*"; and (c) that the evidence is more than merely "*arguable*". The assessment will be fact and context specific and…

[1] Citing the guidance of Lord Hope of Craighead in *Three Rivers (No 3)* [2003] 2 AC 1.

> may depend upon the characteristics of the industry or sector in question." (emphases in original)."

26. Green LJ's reference at (a) to a "*legal and proximate, causal, connection*" goes to the requirement that must be met to establish causation of mitigation through pass-on (see *NTN* at [20]). In its judgment on the appeal from *Royal Mail v DAF* [2024] EWCA Civ 181 (***CA Royal Mail***), the Court of Appeal has held that the test for causation in the context of mitigation is as follows:

> "150. …Factual causation involves consideration of whether the effect of the mitigating conduct was in fact to reduce or eliminate the claimant's loss, whereas legal causation concerns whether, even if the effect of the mitigating conduct was in fact to reduce or eliminate the claimant's loss, as a matter of legal policy, it should serve to reduce or eliminate the damages payable by the defendant to the claimant…".

27. The four principal options by which a merchant may choose to respond to a cost increase identified by the Supreme Court in *Sainsbury's v Visa* [2020] UKSC 24 (***Sainsbury's SC***) are *"(i) a merchant can do nothing in response to the increased cost and thereby suffer a corresponding reduction of profits or an enhanced loss; or (ii) the merchant can respond by reducing discretionary expenditure on its business such as by reducing its marketing and advertising budget or negotiation with its many suppliers; or (iii) the merchant can seek to reduce its costs by negotiation with its many suppliers; or (iv) the merchant can pass on the costs by increasing the prices which it charges its customers*". The present application concerns categories (iii) and (iv), as to which the Supreme Court held that "*the compensatory principle mandates the court to take account of their effect and there will be a question of mitigation of loss.*"

28. Green LJ's comments in *NTN* at [33](b) and (c) that, in order to proceed to trial, the claimed causal connection must be "*realistic*" or "*plausible*", and more than merely arguable, reflect the test for summary determination (see *NTN* at [22]-[23]).

29. As to the degree of evidence required in this context at the summary determination stage:

(1) It is settled that "*the court must take into account evidence that can reasonably be expected to be available at trial, as well as the evidence before it*": *Royal Mail v DAF* [2021] CAT 10 (***Royal Mail (2021)***) at [22], cited in *NTN* at [22].

(2) The principle of effectiveness requires that procedural and evidential rules should not make it too hard to bring claims: *NTN*, [25]-[27]. The amount of evidence required should be realistic and proportionate, consistent with the "*broad axe*" doctrine and seeking to avoid over - or under - compensation while eschewing artificial demands for precision: *NTN*, [28]-[30].

(3) In order for a case of mitigation through pass-on to be triable, there needs to be "*something more than broad economic or business theory to support a reasonable inference that the claimant would in the particular case have sought to mitigate its loss and that the steps taken by it were triggered by, or at least causally connected to, the overcharge in the direct manner required by the British Westinghouse principle*": *NTN*, [31], citing *Royal Mail (2021)*. The *British Westinghouse* principle is that mitigation may be established where a claimant "*has taken action arising out of the transaction*" that caused loss.[2]

30. In *Royal Mail v DAF* [2023] CAT 6 (***CAT Royal Mail***), the Tribunal explained at [186] that the test for causation where pass-on via raised prices is alleged generally requires that: *"… there must be an identifiable increase in prices charged by the merchant and that such increases are causally connected with the overcharge, and demonstrably so*".

31. In *CAT Royal Mail* the Tribunal concluded at [223] and [228] that:

> "…DAF must prove that there was a direct and proximate causative link between the Overcharge and any increase in prices by the Claimants. That

[2] See Green LJ's quotation at *NTN* at [31] from *Royal Mail (2021)* at [35], summarising the effect of [215] of the Supreme Court's judgment in *Sainsbury's v Visa* [2020] UKSC 24 by reference to *British Westinghouse v Underground Electric Railways* (***British Westinghouse***) [1912] AC 673, p689, Viscount Haldane LC.

> means that there must be something more than reliance on the usual planning and budgetary process, into which the Overcharge was input and at some point prices increased…
>
> ….
>
> By way of summary on the legal test for causation in relation to a pass-on form of mitigation defence, we respectfully conclude that DAF must prove a direct and proximate causative link between the Overcharge and any increase in prices by the Claimants. It is not enough for DAF to say that all costs, including increases in costs, are fed into the Claimants' or their regulators' business planning and budgetary processes. There must be something more specific than that and there are a number of potentially relevant factors that it can rely on, including:
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> (1) Knowledge of the Overcharge or the specific increase in the cost in question;
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> (2) The relative size of the Overcharge against the Claimants' overall costs and revenue;
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> (3) The relationship or association between what the Overcharge is incurred on and the product whose prices have been increased; and/or
>
> (4) Whether there are identifiable claims by identifiable purchasers from the Claimants in respect of losses caused by the Overcharge."

32. In *CA Royal Mail* the Court of Appeal dismissed DAF's appeal. However, the Court made clear at [154] that the "four factors" referred to in *CAT Royal Mail* do not exclude the relevance of "*other evidence of factual causation to establish that requisite degree of proximity*".

33. The burden of pleading mitigation through pass-on lies on a defendant. If a triable case is pleaded, "*a heavy evidential burden*" falls on the claimants "*to provide evidence as to how they have dealt with the recovery of their costs in their business*", since most of the relevant material will be exclusively in their hands.[3] The burden of establishing at trial that any loss was mitigated through pass-on then falls on the defendant.[4]

34. It is a question of fact in each case, which the Tribunal must resolve on the evidence adduced before it, whether an overcharge resulting from a breach of

[3] *Sainsbury's SC* at [216] and *Royal Mail (2021)* at [31]-[33].
[4] *CA Royal Mail* at [151].

competition law has caused the claimant to suffer loss or whether all or part of the overcharge has been passed on by the claimant or otherwise mitigated.[5]

35. This will involve an "*evaluative judgment*" by the trial Tribunal based on factual and expert evidence.[6]

36. As regards the degree of precision required in establishing the extent of pass-on, "*[t]he court in applying the compensatory principle is charged with avoiding under-compensation and also over-compensation. Justice is not achieved if a claimant receives less or more than its actual loss… [but the court] may need to rely on estimates.*"[7] The court should not reject an argument of passing-on merely because it cannot be precisely quantified.[8]

E. THE PARTIES' SUBMISSIONS AND THE TRIBUNAL'S ANALYSIS

37. The Claimants note that the "four factors" identified in *CAT Royal Mail* are not satisfied: see paragraph 31 above. However, the Defendants point out that these factors are not exhaustive and that they also refer to *NTN* i.e. the assessment of whether there is a pleadable case of mitigation is "*fact and context specific*" and "*may depend upon the characteristics of the industry or sector in question. It may be easier to show a pleadable case of mitigation in some circumstances than in others.*"

38. The nub of the Defendants' case is that the present case is different from *CAT Royal Mail* and *NTN* and so the Claimants' strike out application should be refused. This is because in the present case the local authorities' statutory obligation to balance their budgets, combined with the evidential material and the unchallenged expert evidence of Messrs Noble and Bezant establishes a realistic and plausible connection between any overcharge and the act of mitigation through increasing income/charges or decreasing costs.

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[5] *Sainsbury's SC* at [189].
[6] *CA Royal Mail* at [156].
[7] *Sainsbury's SC* at [217].
[8] *Sainsbury's SC* at [223].

39. The Claimants suggest that the Tribunal should "grasp the nettle" or "draw a line in the sand" and rule that, on grounds of legal policy, there is no realistic prospect of satisfying the test for legal causation. In short, the Defendants should not be permitted, as a matter of legal policy, to rely on allegations of pass-on from a local authority to the taxpayer.

40. Having heard the parties and considered the evidence (as set out above) the Tribunal fundamentally does not feel that the case for strike out or summary judgment as advanced by the Claimants is made out and so dismisses the Application.

41. It has come to this view for a number of reasons.

42. Firstly (and perhaps most fundamentally) we do not feel that the threshold for a strike out has been met. The legal framework within which the Application is brought is set out above but, as the seminal case of *Three Rivers* and, more recently the Supreme Court in *Okpabi,* both make clear the test is a high one. Its application is more "*obvious"* (if we may borrow that terminology) in simpler and more straightforward cases but is problematic in cases such as this one where there are complex issues of fact and interrelated legal questions which, in turn, are further complicated when one attempts to overlay upon those the legal policy arguments advanced by Mr de la Mare KC. In addition, this Tribunal must also take into account that an appeal process is already underway in relation to the *CA Royal Mail* decision. That heady combination is, inevitably, going to put a court of first instance on its guard where it is invited (as here) to make a determination without a fuller consideration of the underlying facts and the law as it applies to those facts. The risk of an appeal is inevitably heightened – with consequent delay and increased costs which is in no-one's interests ultimately in the effective and proportionate disposal of this matter. Taking all of those factors into account in the circumstances of this case to undertake a preliminary determination rather flows against the very rationale underpinning the strike out/summary judgment jurisdiction which, fundamentally, is to dispose of those matters that a court can assuredly say are plain and obvious. The case advanced by the Claimants here in our view falls squarely within the territory that Floyd LJ in *TFL* counselled against – both in terms of his warning

about dealing with complex issues of fact and law on a summary basis but also where the law on point is in a state of flux and where the premature determination of issues could easily lead to a proliferation of appeals. We see the risk of both issues in the application before us.

43. Secondly, on the question of the availability of pass on as mitigation we are satisfied on the evidence that there is a triable case – both in fact and law. There is clearly a debate between the parties on the point as to the existence of pass on in law and particularly on the facts as they relate to local authorities in particular but the existence or indeed extent of any pass on is something that the Tribunal feels can only be considered at a full trial based on a fuller understanding of the exact factual matrix and legal argument upon it. The evidence we have in the extracts to which we were taken by Ms Abram KC in the expert evidence (of both parties) demonstrates a connection – even if not a linear one and one which, the Tribunal accepts, will raise certain complexities for the Claimants. Having, however, been satisfied that there exists at least an arguable connection leads the Tribunal away from determining the issue on a summary basis. That is compounded, or rather perhaps reinforced, where the Tribunal will have to try the issue in respect of the 28 local authorities who have not been involved in this Application and, further, in respect of those services where the Claimants accept that there is an issue which will have to be tried – the commercial waste services/other services for which charges are raised. In that context, there is nothing attractive in the suggestion that we deal with the question in the form of what would in our view be a "mini-trial" on a discrete issue which is in essence what is invited of us if we were to determine the matter at this stage. Given that there is acceptance on the part of the Claimants that the treatment of commercial waste services provided by local authorities be excluded from the strike out application, it is not a massive leap to the conclusion that there are more generally complex questions of fact in relation to the other analogous heads of claim and arising from that legal argument as to how pass on applies in the peculiar context of local, fire services and other authorities' funding and budgeting constraints.

44. Indeed, not only do the expert reports that are available to us contain sufficient evidence as to the availability of pass on, but they also suggest an approach that

might possibly be taken to identifying its extent. The Claimants assert the perceived difficulty in trying the issues which appears in large part to have driven the Claimants' present application. It is not, in our view, either an attractive or a legally robust argument to suggest – as is implicit in the case advanced for strike out - that these issues are just "too complex". The courts frequently must grapple with complex issues and it would be our intention to do so here through robust and pragmatic case management to arrive at a proportionate way forward. The Supreme Court in *Sainsbury's* has already emphasised that the Tribunal must engage with these issues regardless of their complexity and even where exact quantification of loss ultimately may be problematic. The real point is that the issue of what actual loss has been sustained in the Tribunal's view can only truly be considered when all the evidence has been heard which confirms that it is not appropriate to either rule out the defence or try this important issue on a summary basis. The Tribunal certainly does not find itself in the position where it can say that the arguments are "*never going to fly"* as Ms Abram colloquially but graphically put it.

45. In short, the extent that any Overcharge may have fed into the pricing regime of the Claimants and pass on arises or can be legally maintained as an argument is something the Tribunal feels should be a question that be reserved for the main trial.

46. The arguments advanced by Mr de la Mare on legal policy also in our view fall by a similar analysis. The Tribunal is exhorted to "grasp the nettle" but in essence what is suggested here goes beyond that. The Tribunal is being invited to accept at this summary stage that there can be no pass on in a legal sense from local authorities to the users of their services/residents because in that context the Authority is not acting as an economic undertaking. That is a novel proposition in law and one that has wider ramifications more generally than the issues that arise in this case touching on the ability of local authorities to sue in, for example, tort or delict. On its application here such an issue, the Tribunal feels, is worthy of consideration only after all the evidence and the complex factual matrix has been collated. Whilst it is appreciated that because of this determination the evidential burden will in large part (at least for the next stages of the process) pass to the Claimants the Tribunal nonetheless feels that in the

interests of justice and the upholding of the compensatory principle upon which our jurisprudence is based we can see no short cut - other than to manage that process to trial mindful of both efficiency and proportionality. The novel argument advanced by the Claimants is fundamentally not one suited to summary adjudication - for all the reasons that we have already enumerated – and as so ably set out in the comments of Floyd LJ in *TFL*.

F. CONCLUSION

47. Accordingly, for all of those reasons the Application is dismissed. We reserve all questions of costs in the interim.

48. The Application arises in a case which has been transferred from the High Court of England and Wales to the Tribunal. For the purposes of Rule 18 of the Competition Appeal Tribunal Rules 2015, the proceedings are to be treated as proceedings in England and Wales.

49. This judgment is unanimous.

Sir Marcus Smith
President

The Hon. Lord Ericht

The Hon. Mr Justice Ian Huddleston

Charles Dhanowa, OBE, KC (Hon)
Registrar

Date: 5 July 2024